IN THE
SUPREME COURT OF MISSOURI

No. SC87125

STATE OF MISSOURI,

Respondent,

vs.

CHRISTOPHER MILO WHITELEY,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF DALLAS COUNTY
THIRTIETH JUDICIAL CIRCUIT
THE HONORABLE JOHN W. SIMS, JUDGE

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from a conviction obtained in the Circuit Court of Dallas County on one count each of attempted robbery in the second degree, §§ 564.011 and 569.030, RSMo; and murder in the second degree (felony), § 565.021, RSMo,[1] for which Appellant was sentenced to twelve years imprisonment. Following a Missouri Court of Appeals, Southern District opinion reversing Appellant's conviction, this case was transferred to this Court pursuant to this Court's order upon the Respondent's Application for Transfer. Therefore, jurisdiction lies in this Court pursuant to Article V, § 10, Missouri Constitution (as amended 1982).

[1] All statutory references are to RSMo 2000 unless otherwise indicated.

STATEMENT OF FACTS

On August 4, 2004, Appellant was charged in an amended information with one count each of the class C felony of attempted robbery in the second degree, §§ 564.011 and 569.030, RSMo; and the class A felony of murder in the second degree (felony), § 565.021, RSMo. (L.F. 8). The charge of attempted robbery in the second degree was based on the theory that Appellant demanded $50 from a man named Christopher Hamilton and then struck him as a substantial step towards forcibly stealing the money from Hamilton. (L.F. 8). The charge of murder in the second degree was based on the theory that Appellant's companion, Eldon Lee Sanders, was shot and killed by Hamilton as a result of Appellant's attempt to commit robbery. (L.F. 8).

Appellant was tried by a jury on August 4-5, 2004, before Judge John W. Sims. (L.F. 4-5). Appellant does not contest the sufficiency of the evidence to support his conviction. Viewed in the light most favorable to the verdict, the evidence at trial showed:

Appellant and a man named David Franklin were hired sometime prior to July of 2003 to cut brush and do some mowing on a piece of land in Dallas County, near Bennett Springs State Park. (Tr. 164, 165). The two men were hired by Christopher Hamilton. (Tr. 162, 165). He was planning to move with his wife and son from Illinois back to Dallas County, and wanted to live on the land, which was owned by his mother. (Tr. 162-64). Hamilton had promised to pay $160 to Franklin and $100 to Appellant for clearing the property. (Tr. 167). After the work was finished, Hamilton paid Franklin the full

amount promised to him, but paid Appellant only $20 of the $100 he owed him. (Tr. 167-68). Hamilton had known Appellant for several years, and Appellant lived a short distance from the property owned by Hamilton's mother. (Tr. 168-69). Hamilton told Appellant that he did not have enough money to pay him in full, but that he would pay Appellant in full as soon as he could. (Tr. 168). When Hamilton did not come through with the money, Appellant began making threats, among them that he would rape Hamilton's wife. (Tr. 174).

On or about September 1, 2003, Hamilton was sitting outside of his trailer with his wife, son, and two other people when Appellant drove up in his truck. (Tr. 171-72, 242). Hamilton could not recall at trial exactly what Appellant said, but he and his wife testified that everyone who was there became frightened. (Tr. 172, 242-44). Hamilton's wife testified that Appellant asked her husband for more money. (Tr. 244). Appellant was described as agitated, volatile, upset, mad, and yelling things out the window of his truck as he left. (Tr. 172, 244). Hamilton and his family drove to the south end of their property, which was concealed from the general location of their trailer home, in order to hide out from Appellant. (Tr. 173, 245). While hiding out there, the Hamiltons heard a loud truck that sounded like Appellant's pull into their driveway. (Tr. 176-77, 245). After the truck left, Hamilton went to investigate and found the front windshield of one of his vehicles had been broken out. (Tr. 177).

Appellant spent much of the day of September 3, 2003 at the trailer of his neighbors, Eldon Lee Sanders and Jeannie Greene. (Tr. 380-81, 388-90). Appellant

made several comments throughout the day about wanting to collect money from Hamilton. (Tr. 380-81, 393-94). Appellant also said that he was going to kill Hamilton, and he didn't care if it was over five cents or fifty cents. (Tr. 394). Appellant and Sanders left the trailer towards evening to go to the Moose Lodge. (Tr. 392). They also stopped at a store near Bennett Springs State Park. (Tr. 305-07).

After Appellant left the store, he encountered Hamilton's vehicle going in the opposite direction. (Tr. 178-79). Appellant yelled something out the window of the vehicle, and Hamilton stopped. (Tr. 179). Appellant asked Hamilton if he had the money he owed him, Hamilton replied that he did, and gave Appellant $80. (Tr. 179). Appellant demanded another $50 from Hamilton and threw a beer bottle over the top of Hamilton's truck. (Tr. 180, 185-86). Hamilton drove on to the store where he told the store owner about the problems he had been having with Appellant. (Tr. 180, Tr. 309-11). The store owner convinced Hamilton to make a report to the police, and Hamilton called the Dallas County Sheriff's Department. (Tr. 180-81, 310, 316-17).

Appellant and Sanders returned to Sanders's trailer. (Tr. 392-93). After having a couple of drinks, Appellant said that he wanted to go up the road and collect some money. (Tr. 393). Appellant convinced Sanders to drive him up to Hamilton's property. (Tr. 395).

Hamilton was standing outside his trailer when Appellant and Sanders arrived in Sanders's truck. (Tr. 185-86). Appellant walked up to Hamilton and began punching him in the face. (Tr. 186). He then grabbed a club from the back of the truck and Hamilton

ran inside his camper. (Tr. 186). Hamilton grabbed a shotgun and headed for the camper door. (Tr. 186-87, 252). As he got to the entrance of the camper, Hamilton saw Sanders coming towards the door from the outside. (Tr. 187). Sanders placed his foot on the bottom step leading to the doorway, and Hamilton shot him. (Tr. 187, 253). Sanders died at the scene from a gunshot wound to the chest. (Tr. 262).

Appellant ran off through the woods. (Tr. 279, 321, 343). He ran to Sanders's trailer and said that he had done something awful and that he had killed Sanders. (Tr. 383, 396). Greene and the other people at the trailer left to try and find out what had happened to Sanders. (Tr. 383-84, 396-97).

The gunshot was heard by Highway Patrol Trooper Jason Glendenning, who had been staking out Appellant's residence, along with another trooper and a conservation agent. (Tr. 270-71, 275-76). The officers had observed Appellant and Sanders drive away from Appellant's trailer towards Hamilton's property just a few minutes before the gunshot was fired. (Tr. 275-76). When Glendenning arrived at the scene, he observed that Appellant was not there, and went with other officers to Appellant's trailer to try and locate him. (Tr. 278-80, 322-23, 335-36). Appellant was found at the trailer and taken into custody. (Tr. 281, 327, 336).

Following evidence, argument, instructions, and deliberation, the jury convicted Appellant on both counts. (L.F. 5, 40, 41). The jury then heard evidence, argument and instructions on the penalty phase of the trial. (L.F. 5). Following deliberations, the jury returned with a recommended sentence of twelve months in the county jail for attempted

robbery in the second degree, and twelve years imprisonment in the Department of Corrections for murder in the second degree. (L.F. 5, 47, 48). Appellant appeared for sentencing on October 14, 2004. (L.F. 5). Appellant's motion for new trial was overruled and the trial court imposed the sentences recommended by the jury, ordering that the sentences run concurrently. (L.F. 5-6, 60). An appeal was filed with the Missouri Court of Appeals for the Southern District on October 15, 2004. (L.F. 64). The Court of Appeals issued an opinion on August 22, 2005, reversing Appellant's conviction and sentence, and remanding for a new trial. *State v. Whiteley*, No. SD26603, slip op (Aug. 22, 2005). On application by Respondent, this Court ordered this case transferred to it on November 1, 2005.

ARGUMENT

I.

The trial court did not err in refusing to instruct the jury on third-degree assault as a lesser-included offense of attempted second degree robbery because third-degree assault is not a lesser-included offense of second-degree robbery and even if it is, there was no basis for the jury to acquit Appellant on the offense charged and convict him on the lesser charge, in that the only basis Appellant claims to support an acquittal on attempted robbery in the second degree is the defense of claim-of-right under § 570.070, RSMo, which does not apply to the offense of robbery and which was not supported by the evidence adduced at trial, since the uncontradicted evidence was that Christopher Hamilton had fully paid-off his debt to Appellant, and in that Appellant never proffered an instruction on the claim-of-right defense so that the jury would have had no basis under the instructions to acquit Appellant of the charged offense and convict him on the lesser offense.

Appellant claims the trial court erred in refusing to instruct the jury on third-degree assault as a lesser-included offense of attempted second degree robbery. Appellant contends there is a basis for acquittal of the higher offense and a conviction on the lower offense since there was evidence that Appellant acted under a claim-of-right because Christopher Hamilton had not paid Appellant for the work he performed for Hamilton.

A. Standard of Review.

The trial court is obligated to instruct the jury on a lesser-included offense only where there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the lesser offense. § 556.046.2, RSMo Supp. 2004; *State v. Hibler*, 5 S.W.3d 147, 148 (Mo. banc 1999). If in doubt, the trial court should instruct on the lesser-included offense. *Hibler*, 5 S.W.3d at 148. Nevertheless, a defendant is not entitled to an instruction on a lesser-included offense unless the instruction is supported by the evidence and any logical inferences derived from the evidence. *State v. Newberry*, 157 S.W.3d 387, 393 (Mo. App. S.D. 2005).

B. Third-degree assault not a lesser-included offense of second-degree robbery.

A lesser-included offense is established by proof of the same or less than all the facts required to establish the commission of the offense charged. § 556.046.1(1), RSMo Supp. 2004; *State v. Derenzy*, 89 S.W.3d 472, 474 (Mo. banc 2002). In determining whether an offense is a lesser-included, this Court uses the "statutory elements test," which focuses on the elements required by the statutes proscribing the offenses. *State v. Barnard*, 972 S.W.2d 462, 465 (Mo. banc 1998). "The elements of the two offenses must be compared in theory, without regard to the specific conduct alleged." *Derenzy*, 89 S.W.3d at 474. If the lesser offense requires the inclusion of a necessary element not so included in the greater offense, the lesser is not necessarily included in the greater. *Barnard*, 972 S.W.2d at 465. An instruction on a lesser-included offense is not proper

unless it is impossible to commit the greater without necessarily committing the lesser. *Id.*; *Derenzy*, 89 S.W.3d at 474.

Appellant claims that assault in the third degree is a lesser-included offense of robbery in the second degree. A comparison of the statutory elements of the two offenses, without regard to the facts of the case, refutes that contention. The statute establishing the offense of robbery in the second degree contains only one element:

> A person commits the crime of robbery in the second degree when he forcibly steals property.

§ 569.030.1, RSMo 2000. "Forcibly steals" is defined as using or threatening to use physical force upon another person for the purpose of preventing or overcoming resistance to the taking of property, retaining property after it is taken, compelling the owner of property to deliver-up the property, or other conduct which aids in the commission of the theft. § 569.010(1), RSMo 2000.

By contrast, the statute establishing the offense of assault in the third degree reads:

> A person commits the crime of assault in the third degree if:
>
> (1) The person attempts to cause or recklessly causes physical injury to another person; or
>
> (2) With criminal negligence the person causes physical injury to another person by means of a deadly weapon; or
>
> (3) The person purposely places another person in apprehension of immediate physical injury; or

(4) The person recklessly engages in conduct which creates a grave risk of death or serious physical injury to another person; or

(5) The person knowingly causes physical contact with another person knowing the other person will regard the contact as offensive or provocative; or

(6) The person knowingly causes physical contact with an incapacitated person, as defined in section 475.010, RSMo, which a reasonable person, who is not incapacitated, would consider offensive or provocative.

§ 565.070.1, RSMo 2000.

Comparing the elements of the two offenses shows that a person can commit robbery in the second degree without necessarily committing assault in the third degree. Robbery in the second degree requires only the use or threatened use of physical force in order to forcibly steal. §§ 569.030.1; 569.010(1), RSMo. Assault in the third degree requires a greater showing: that a person causes, attempts to cause, or places another in apprehension of physical injury; creates a grave risk of death or serious physical injury; or knowingly causes offensive or provocative contact. § 565.070, RSMo. The physical force used to commit robbery in the second degree does not need to cause or create the risk of any level of physical injury; does not require that physical contact be made with the victim; and does not require knowledge that the victim considers any physical contact that is made to be offensive or provocative.

For instance, the "forcibly steals" requirement for second-degree robbery has been met where the defendant kept his hand in his pocket as he demanded money from a store clerk. *State v. Lybarger*, 165 S.W.3d 180, 186 (Mo. App. W.D. 2005). The Western District noted that, "[t]hreatened physical force may be implied when the defendant engages in behavior that suggests he has a weapon, or from the use of fear-invoking phrases such as 'this is a holdup.'" *Id.* at 187. In *Lybarger* there was no physical contact between the defendant and the victim, and there was no physical injury or risk of physical injury, since there was no evidence that the defendant was actually armed. *Id.* at 186. *Lybarger* thus shows that it is possible to commit robbery in the second degree without committing assault in the third degree.

A comparison of Instruction No. 7, that submitted attempted robbery in the second degree, and Appellant's proposed Instruction No. A on assault in the third degree also shows the elements of the latter are not included in the former. The two instructions asked the jury to find the following elements:

Instruction No. 7	Instruction No. A
First, that on or about September 3, 2003, in the County of Dallas, State of Missouri, the defendant went to the home of Christopher Hamilton and struck him, after demanding $50.00 from Christopher Hamilton, and	That on or about September 3, 2003, in the County of Dallas, State of Missouri, the defendant *attempted to cause physical injury* to Christopher Hamilton by striking him in the face.

Second, that such conduct was a substantial step toward the commission of the offense of robbery in the second degree of Christopher Hamilton, and

Third, that defendant engaged in such conduct with the purpose of committing such robbery in the second degree.

(L.F. 33; Supp. L.F. 1) (emphasis added).

The significant difference in the two instructions is that Instruction A, which submitted the alleged lesser-included offense, required the jury to find that Appellant struck Christopher Hamilton as part of an attempt to cause physical injury. This means that the jury would have had to find that causing physical injury was Appellant's conscious object.[2] But, this *element* was not included in Instruction No. 7. The jury did not have to find an intent to cause physical injury in order to find Appellant guilty of

[2] An attempt to commit an offense requires the culpable mental state of purposely. § 564.011.1, RSMo 2000. A person acts purposely, or with purpose, with respect to his conduct or to a result thereof when it is his conscious object to engage in that conduct or to cause that result. § 562.016.2, RSMo 2000.

attempted robbery in the second degree. Indeed, while Appellant might have actually had that intent under the *facts* of this case, such an intent was not an *element* of the charged offense. Because Instruction A included an element not found in Instruction 7, it was not a lesser-included offense.

Appellant cites to *State v. Smith* as authority for his contention that assault in the third degree is a lesser-included offense to robbery in the second degree. *State v. Smith*, 822 S.W.2d 911, 915 (Mo. App. E.D. 1991). In *Smith*, the Eastern District found insufficient evidence to convict the defendant of robbery in the second degree, but that the defendant was not entitled to an acquittal because the evidence proved common assault, which the court described as a lesser-included offense. *Id.* To the extent *Smith* conflicts with the analysis set forth by this Court in *Derenzy*, it should be overruled.

Because assault in the third degree requires proof of more facts than robbery in the second degree, it is not a lesser-included offense of robbery in the second degree. Even if this Court were to find that assault in the third degree is a lesser-included offense of robbery in the second degree, Appellant is not entitled to relief because he has not shown that he was entitled to an instruction on assault in the third degree.

C. Defense of claim-of-right not applicable to robbery charge.

The crux of Appellant's argument that an instruction on assault in the third degree was warranted is that there was a basis for acquitting him of the greater offense of attempted second-degree robbery and convicting him of third-degree assault because of the statutory defense of claim-of-right. The claim-of-right statute reads as follows:

1. A person does not commit an offense under section 570.030 if, at the time of the appropriation, he

(1) Acted in the honest belief that he had the right to do so; or

(2) Acted in the honest belief that the owner, if present, would have consented to the appropriation.

2. The defendant shall have the burden of injecting the issue of claim of right.

§ 570.070, RSMo 2000.

The first and most obvious problem with this argument is that Appellant was charged with attempted robbery in the second degree under § 569.030, RSMo, not with stealing under § 570.030, RSMo. (L.F. 8). Section 570.070 has previously been held to be inapplicable to robbery cases. *State v. Williams*, 34 S.W.3d 440, 443 (Mo. App. S.D. 2001).

Appellant cites to this Court's decision in *State v. Quisenberry* in support of his argument that the claim of right defense applies in this case. *State v. Quisenberry*, 639 S.W.2d 579, 582 (Mo. banc 1982). But, *Quisenberry* does not hold that § 570.030 applies to robbery offenses. The defendant in *Quisenberry* was convicted of two offenses: stealing property with a value of $150 or more, and second degree burglary. *Id.* at 580-81. He claimed that the court erred in not instructing the jury on the defense of claim-of-right. *Id.* at 582. In a footnote, this Court stated: "It follows that an honest claim of right is also a defense to a charge of burglary based on entry of a building with an intent to

steal." *Id.* at 582 n.4. This Court thus extended the claim-of-right defense only to charges directly related to the base offense of stealing. *Quisenberry* cannot be read to extend the claim-of-right defense to any offense that merely resembles stealing.

It is true that the Notes on Use to the verdict-directing instruction for robbery in the second degree does indicate that a claim-of-right defense is available under § 570.070, and it sets out language to be inserted in the instruction when there is evidence supporting the defense. MAI-CR 3d 323.04, Notes on Use, ¶ 2. The Notes on Use conflict with the plain language of § 570.070. MAI-CR and its Notes on Use are not binding to the extent they conflict with the substantive law. *State v. Zumwalt*, 973 S.W.2d 504, 509 (Mo. App. S.D. 1998). Procedural rules adopted under the MAI cannot change the substantive law, and a court should decline to follow an MAI instruction that conflicts with the substantive law. *Id.* The Notes on Use thus do not support Appellant's claim that he was entitled to a claim-of-right instruction.

D. Evidence did not support claim-of-right defense.

Even if Appellant had been entitled to a claim-of-right defense, the evidence does not support such a defense. Contrary to Appellant's argument, the testimony of Christopher Hamilton does not establish that Hamilton still owed Appellant money. Hamilton testified that he could not remember when he made the initial payment of $20 to Appellant, but he did not contradict his testimony that he paid the remaining $80 that he owed Appellant on September 3, 2003. (Tr. 217).

That leaves only the testimony that Appellant had made statements while at Sanders's home that Appellant owed him money and that he was going to go and collect it. (Tr. 381, 395). That is not enough, however. "To warrant submission of the claim of right defense, there must be, apart from testimony of the defendant or principal as to his subjective belief, sufficient evidence to enable the court to infer that the relevant person *honestly* held that belief." *Quisenberry*, 639 S.W.2d at 584 (emphasis in original). The naked assertion of an honest belief in a legal right is insufficient to raise the claim-of-right defense, where that assertion is unsupported by any evidence of facts or circumstances from which such a belief might reasonably be inferred. *State v. Smith*, 684 S.W.2d 576, 580 (Mo. App. S.D. 1984). The evidence in this case is that Hamilton had paid Appellant in full prior to the incident that resulted in Sanders' death. (Tr. 179). No contradictory evidence was presented. No evidence was presented showing that Appellant was entitled to any more from Hamilton, nor was there any evidence of facts or

circumstances to support a reasonable inference that Appellant held an *honest* belief that he was entitled to more money.

Also inherent in the concept of the claim-of-right defense is that the act charged did not possess the qualities of criminality. *Id.* The uncontradicted evidence is that Appellant drove to Hamilton's property, and immediately began hitting Hamilton. (Tr. 186). Appellant then grabbed a club, which he presumably would have used to continue the attack had Hamilton not retreated inside his trailer. (Tr. 186). Appellant's actions possessed the qualitities of criminality and are inconsistent with any reasonable inference that Appellant honestly believed that he was entitled to more money from Hamilton.

E. Appellant did not request a claim-of-right instruction.

Because the evidence did not support a claim-of-right defense, Appellant would not have been entitled to an instruction on claim-of-right if he had requested it, which leads to another problem with Appellant's claim. His point on appeal is that the trial court erred in refusing his proferred instruction on the lesser-included offense of assault in the third degree because the claim-of-right defense gave the jury a basis to acquit him of the greater offense of attempted robbery in the second degree. *See*, (Supp. L.F. 1). Appellant never asked that the jury be instructed on the claim-of-right defense. The verdict director submitted to the jury on attempted robbery in the second degree was prepared by Appellant. (L.F. 33). The court refused to give another version of the verdict director that Appellant had prepared, but that version also did not include any language on the claim-of-right defense. (L.F. 37).

Claim-of-right is not an instruction that the Court is required to give absent a request from the defendant. *See*, MAI-CR 3d 306.00 Series. Because Appellant did not proffer an instruction on the claim-of-right defense, he failed to provide the jury with a basis to acquit him of attempted robbery in the second degree and convict him of the lesser offense of assault in the third degree. *See*, § 556.046.2, RSMo. The trial court thus did not err in refusing to submit Appellant's instruction on assault in the third degree. *Id.*

F. Felony murder conviction does not require attempted robbery conviction.

If this Court were to reverse Appellant's conviction for attempted robbery in the second degree, such finding would not require reversal of Appellant's conviction for felony murder. The Court of Appeals for the Western District has previously found that reversal of a conviction for attempted manufacture of a controlled substance did not require reversal of an associated conviction for felony murder. *State v. Graham*, 2 S.W.3d 859, 866 (Mo. App. W.D. 1999). As the court noted, *conviction* of an underlying felony is not required to convict a person of felony murder. *Id.* (emphasis added). The jury only needs to find that the defendant attempted the underlying felony to support a felony murder conviction, even if the underlying felony is not submitted as a separate count. *Id.* Put another way, the felony murder instruction does not require a finding of *guilt* of the underlying felony, just a finding of its commission.[3] *Id.* (emphasis in

[3] This distinguishes felony murder from armed criminal action, which requires conviction of the underlying offense. *See*, § 571.015, RSMo 2000. Thus, where

original). In convicting Appellant of felony murder, the jury found that Christopher Hamilton shot and killed Eldon Lee Sanders while trying to prevent commission of a robbery, and that Eldon Lee Sanders was killed as a result of the perpetration of that robbery. (L.F. 34, 41). The jury thus made a sufficient finding to convict Appellant of felony murder, and that conviction should be affirmed, even if the conviction for attempted robbery is reversed.

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a predicate conviction underlying an armed criminal action charge is reversed, the armed criminal action conviction is also reversed.

II.

The trial court did not abuse its discretion in admitting evidence that Appellant had previously threatened Christopher Hamilton and his family because the evidence was relevant and admissible to show Appellant's motive for committing the offense of attempted robbery in the second degree, in that the prior threats were probative of Appellant's intent to intimidate Hamilton into paying him money, and showed that his motive in going to Hamilton's home and hitting him on the evening of September 3, 2003, was to further intimidate Hamilton into giving more money to Appellant.

Appellant claims the trial court abused its discretion in admitting evidence over Appellant's objection that Appellant had threatened to rape Christopher Hamilton's wife, and that Appellant threatened Hamilton's family in an incident in which the family was forced to hide out and a window in Hamilton's vehicle was broken out. Appellant claims the evidence was neither legally or logically relevant, and its admission violated his right to be tried only for the crime with which he was charged.

A. Standard of Review.

The trial court has broad discretion to admit or exclude evidence at trial and the trial court's decision will be upheld unless there is a showing of a clear abuse of discretion. *State v. Chaney*, 967 S.W.2d 47, 55 (Mo. banc 1998). Error in admitting evidence is not prejudicial and does not require reversal unless it is outcome-determinative. *State v. Douglas*, 131 S.W.3d 818, 824 (Mo. App. W.D. 2004). Appellant

bears the burden of proving that a reasonable probability exists that the jury's verdict would have been different but for the improperly admitted evidence. *State v. Garrett*, 139 S.W.3d 577, 581 (Mo. App. S.D. 2004).

B. Evidence was admissible to establish motive.

Evidence of uncharged crimes, wrongs, or acts is admissible where it is logically or legally relevant towards proving the charged crime. *State v. Bernard*, 849 S.W.2d 10, 13 (Mo. banc 1993). Evidence is logically relevant if it has some legitimate tendency to establish directly the accused's guilt of the charges for which he is on trial. *Id.* Evidence is legally relevant if its probative value outweighs its prejudicial effect. *Id.* Balancing the probative value and the prejudicial effect of such evidence rests within the sound discretion of the trial court, which is in the best position to make that determination. *Id.*; *State v. Coutee*, 879 S.W.2d 762, 767 (Mo. App. S.D. 1994).

Evidence of uncharged misconduct has a legitimate tendency to prove the specific crime charged when it tends to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the person charged with the crime on trial. *Bernard*, 849 S.W.2d at 13. Those five exceptions are not exclusive, and evidence of prior misconduct not falling within those exceptions may nonetheless be admissible if the evidence is logically and legally relevant. *Id.*

Testimony about Appellant's threats against Hamilton and his wife was admissible as tending to prove Appellant's motive for robbing Hamilton. *See*, *State v. Stewart*, 18 S.W.3d 75, 86 (Mo. App. E.D. 2000) (prior threats against victim and victim's mother relevant as showing defendant's motive to harm victim). Evidence that a defendant had previously threatened the victim over money owed for a drug debt was found relevant and admissible to show the defendant's motive for murdering the victim. *State v. Garner*, 14 S.W.3d 67, 74 (Mo. App. E.D. 1999). The court determined that the probative value of the evidence outweighed the prejudicial value even though there was evidence the victim had repaid the debt to the defendant. *Id.* That is because there was evidence that even after repayment of the debt, the defendant had continued to threaten the victim over money allegedly owed. *Id.*

A similar situation exists in this case. The evidence Appellant complains of establishes that he made threats to Hamilton and his family over the $80 Hamilton owed him for the brush-clearing work. (Tr. 171-72, 174, 242-44). There was also evidence that Appellant continued to demand money from Hamilton even after Hamilton paid Appellant the $80. (Tr. 180, 185-85, 311). The evidence is thus probative of Appellant's intent to intimidate Hamilton into paying him money, and shows that his motive in going to Hamilton's home and hitting him on the evening of September 3, 2003, was to further intimidate Hamilton into giving more money to Appellant. *See*, *State v. McGirk*, 999 S.W.2d 298, 304 (Mo. App. W.D. 1999) (evidence of prior bad acts admissible to show defendant's motive to intimidate victim).

Even if the trial court erred in permitting the evidence of the prior threats, that error did not prejudice Appellant. Evidence that might be prejudicial in a close case is harmless where the evidence of guilt is strong. *State v. Hayes*, 113 S.W.3d 222, 226 (Mo. App. E.D. 2003). Even without the evidence of the prior threats, the jury still heard evidence that Appellant had made statements throughout the day of the shooting that he was going to collect money that was owed to him. (Tr. 380-81, 393-94). There was also testimony that some of those comments came immediately before Appellant and Sanders left to go to Sanders' property. (Tr. 393, 395). In light of that strong evidence supporting the conviction for attempted robbery, there is no reasonable probability that the jury would have reached a different verdict had evidence of the prior threats been excluded.

CONCLUSION

In view of the foregoing, Respondent submits that Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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STATE OF MISSOURI

CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) The attached brief complies with the limitations set forth in Supreme Court Rule 84.06, in that it contains 5,770 words as calculated pursuant to the requirements of Supreme Court Rule 84.06; and

(2) A copy of the brief has been supplied to the Court in diskette form on a diskette that has been scanned and found to be virus free; and

(3) A true and correct copy of the attached brief and a diskette containing a copy of this brief were mailed on December 9, 2005, to:

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Respectfully submitted,

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